



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 18, 1998

Ms. Cathy Cunningham
Senior Assistant City Attorney
City of Irving
P.O. Box 152288
Irving, Texas 75015-2288

OR98-0463

Dear Ms. Cunningham:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112623.

The City of Irving (the "city") received a request for

[a]ll correspondence, including letters, briefing materials, written documents and memoranda sent to the City of Irving regarding the Walker public housing complaint in the last six months. In addition . . . all letters, briefing materials, written documents and memoranda distributed by the city to the council, to the Walker case plaintiffs or to the United States Department of Housing and Urban Development in the last six months.

You assert that the requested information is excepted from required public disclosure based on Government Code section 552.103 and section 552.107.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990). However, the fact that an individual has hired an attorney or that a request for information was made by an attorney does not, without more, demonstrate that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2.

In reviewing your argument that "[t]he litigation exception is applicable because currently there is a class action lawsuit pending into which the City of Irving may be joined and a housing discrimination complaint on file at the United States Department of Housing and Urban Development" as well as examining the documents submitted, the city offers no evidence aside from the foregoing statement which constitutes a reasonable threat of litigation. Therefore, we conclude that the city has not established that litigation is reasonably anticipated. Therefore, the city may not withhold the requested information under section 552.103.

However, you also contend that various documents are confidential attorney-client communications under section 552.107. Section 552.107 excepts information from required public disclosure if:

(1) it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas; or

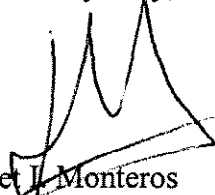
(2) a court by order has prohibited disclosure of the information.

You have submitted a number of documents to this office that you contend are confidential attorney-client communications. You assert section 552.107 for the documents but do not advise this office how the exception extends to all the documents submitted to this office. We observe that section 552.107 does not provide a blanket exception for all communications between clients and attorneys or all documents created by an attorney. It excepts only those communications that reveal client confidences or the attorney's legal opinion or advice. Open Records Decision Nos. 589 (1991) at 1, 574 (1990) at 3, 462 (1987) at 9-11. Section 552.107 does not except from disclosure a "basically factual recounting of events." Open Records Decision No. 574 (1990) at 5. It also does not except from disclosure "the attorney's mere documentation of calls made, meetings attended or memos sent . . . if no notes revealing the attorney's legal advice or the client's confidences are included." *Id.*

You did mark some of the information submitted for review as excepted under section 552.107. However we were unable to ascertain how you applied the exception to those documents you did not mark. Additionally, we note that it was your responsibility to show the applicability of section 552.107 to the information. Open Records Decision No. 542 (1990) at 2 ("governmental body bears the burden of stating which exceptions apply and why"). We have examined the information you marked and we agree with portions of your markings in those documents as they document confidences of governmental representatives or reveals an attorney's legal opinion and advice. The marked information, except where we have indicated otherwise, may therefore be withheld from required public disclosure. The remaining information does not appear to reveal client confidences or an attorney's legal opinion and advice to the client, and may not be withheld under section 552.107.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Janet J. Monteros
Assistant Attorney General
Open Records Division

JIM/glg

Ref.: ID# 112623

Enclosures: Submitted documents

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(w/o enclosures)